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Supreme Court, U.S.
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(3)

No.

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL, PETITIONER

v.

VOLVO CARS NORTH AMERICA, L.L.C.

PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Illinois courts violate the fourteenth amendment when they deprived plaintiff of the judgment entered in his favor on a jury's verdict – without oral argument and by virtue of an unpublished opinion, likely written by law clerks – where loss of the verdict was a meaningful deprivation of property, oral argument would have been a significant hedge against erroneous deprivation, and where the cost to the state of providing oral argument would have been de minimus? *See, Matthews v. Eldridge*, 424 U.S. 319 (1976).

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OPINIONS BELOW

None – the opinions and orders were unpublished, which is one of the reasons Plaintiff believes review is warranted.

JURISDICTION

The order sought to be reviewed was entered December 8, 2006. Rehearing was denied January 10, 2007. The Illinois Supreme Court denied review on May 31, 2007. This Court issued an order on Jul 31, 2007 extending the time to file a writ of certiorari until October 28, 2007, a Sunday, which makes the petition due October 29, 2007. Review is authorized under 28 U.S.C sec. 1257.

RELEVANT PROVISIONS INVOLVED

Fourteenth Amendment, Section. 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Plaintiff, Marshall Spiegel brought this action on October 9, 2001 against Volvo Cars North America, LLC for breach of warranty. The case proceeded to trial. On June 21, 2004, a jury found for Spiegel and awarded him $10,680.00 -- $7300 for diminished value; $2700 for aggravation and inconvenience and $380 for loss of use. (C 1133.). Defendant Volvo filed a Notice of Appeal on September 6, 2005 (C 1132-35.) The appellate court reversed the trial court's decision on December 8, 2006 and entered judgment *nov* against Spiegel on the basis that the diminished value evidence was admitted without proper foundation. The court never addressed the aggravation and inconvenience award or the loss of use award, and did not explain those amounts would not defeat jnov; nor did the court explain why it granted judgment nov as a result of an evidentiary error, as opposed to simply granting a new trial, which is typically the remedy for improperly admitted evidence.

REASONS FOR GRANTING THE PETITION

The Illinois appellate court did not permit oral argument, even though both parties requested it. The court deprived Spiegel of his jury verdict and judgment without the benefit of oral argument and by issuing an unpublished order, likely written by law clerks and which did not even address the major contentions raised by the parties in the appeal. Spiegel moved for rehearing, demanding oral argument, which was denied. The Illinois Supreme Court denied review without explanation. Because the constitutional error

complained of occurred at the appellate level – when the appellate court deprived Plaintiff of a jury verdict and judgment without due process by refusing oral argument – the constitutional issues could not have been raised earlier than they were: on rehearing and by seeking a petition for leave to appeal to the Illinois Supreme Court.

Argument

The fourteenth amendment to the United States Constitution prohibits any State from depriving, "any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV, § 1. A judgment entered on a jury verdict is a property interest protected by the Constitution. This is obviously so because, as this Court has repeatedly held, a cause of action is a property right. *See, Tulsa Professional Collection Servs. v. Pope*, 108 S. Ct. 1340, 1344-45 (1988)(finding contractual cause of action to be property); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)(holding the right to bring action is property); *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982)(holding portions of the Bankruptcy Reform Act of 1978 was an unconstitutional taking to the extent that it permitted a bankruptcy court to deprive a secured creditor of its property interest in collateral). If a mere cause of action is a property right, then certainly a judgment entered upon a jury verdict is a property right. Moreover, even if the verdict is subject to possible – or even likely – reversal, it is still worth something. This Court stressed in *Goss v. Lopez*, 419 U.S. 565, 579 (1974), "as long as the property deprivation is not de minimis, its gravity is irrelevant to whether account must be taken

of the Due Process Clause." Clearly, a $10,680 jury verdict (plus a $40,000) fee award is not de minimus.

Defendant Volvo raised numerous issues on appeal and the parties' submitted extensive and comprehensive briefs on a number of important issues. Ultimately, the vast majority of these issues were simply not addressed by the Court. Even though both parties requested oral argument, the appellate court refused to conduct one. Instead, on December 8, 2006, the clerk issued an unpublished order vacating the judgment and jury verdict in favor of Plaintiff, and entering judgment in favor of Defendant. (Order, p. 8.) The stated rationale was that the trial judge made an evidentiary error and admitted certain damages testimony on an insufficient foundation. In Illinois, as in all jurisdictions, the remedy for improper admission of evidence is a new trial, not *jnov. Bryant v. Livigni*, 250 Ill. App. 3d 303, 310 (5th Dist. 1993).

Judge Alex Kozinsky has candidly admitted that unpublished opinions are often written by law clerks. Tony Mauro, "Unpublished Opinions: Inedible Sausage of Crazy Uncle?" *Legal Times*, (April 12, 2004). And the quality of the legal reasoning in the order at issue in this case – to be quite candid – approximates that of a third-year law student. This, of course, puts this case squarely within the larger controversy regarding unpublished opinions generally, *see e.g., Anastasoff v. United States. 223 F.3d 898, 899-905 (8th Cir. 2000)* (holding that local rule stating that unpublished opinions are not precedent was unconstitutional), vacated as moot *235 F.3d 1054 (8th Cir. 2000)* (en banc), with *Hart v. Massanari. 266 F.3d 1155 (9th Cir. 2001)*

(Kozinski, J.) (holding similar rule constitutional); *Symbol Techs., Inc. v. Lemelson Med., 277 F.3d 1361, 1366-68 (Fed. Cir. 2002)* (same); see also Richard S. Arnold, Unpublished Opinions: A Comment. *1 J. App. Prac. & Process 219 (1999)*; Stephen R. Barnett, In Support of Proposed Federal Rule 32.1: A Reply to Judge Alex Kozinski. Fed. Law. Nov./Dec. 2004, at 32; Anne Coyle, Note, A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in Federal Courts of Appeals. *72 Fordham L. Rev. 2471 (2004)*; Lawrence J. Fox, Note, Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility, *32 Hofstra L. Rev. 1215 (2004)*; Hon. Alex Kozinski, Letter, Fed. Law., June 2004, at 37; Gary Young, Cite. Publish or Perish?, Nat'l L.J., May 3, 2004, at SI.

But this matter of significant public concern has been rendered even more acute (unconstitutionally so) in this case by the refusal to grant oral argument. Indeed, Spiegel has no idea whether a judicial officer was even involved in the decision to deprive him of his judgment and jury verdict. As one commentator has explained, "the public relations function of contact between attorneys and judges during argument is especially important when attorneys suspect that not all judges read the briefs or that the court's staff plays a major role in the decision process." Stephen Wasby, "The functions and importance of appellate oral argument: some views of lawyers and federal judges," pp. 352-355, in Judical Politics (Slotnick, Elliot, Eds.) The Hruska Commission echoed this perspective in pointing out that oral argument "assures the litigant

that his case has been given consideration by those charged with deciding it." *Id.*

In this case, Defendant did not avail itself of the opportunity to seek a new trial as a result of a claimed evidentiary error. Instead, Defendant chose to move only for judgment notwithstanding the verdict on a variety of state-law-based legal grounds, of no concern to this Court or relevance to this petition. While Plaintiff does not agree with the appellate court's decision regarding the sufficiency of the foundation laid at trial, Plaintiff wants to stress that the purpose of this petition, obviously, is not to quibble about the sufficiency (or insufficiency) of Spiegel's evidentiary foundation. Even if Plaintiff were to agree that the foundation was inadequate, the only legally permissible remedy was a new trial, not *jnov*. And by granting a *jnov* under such circumstances, – without hearing or oral argument – the Illinois Appellate Court committed a serious constitutional violation. This Court's review is required because it is the only form of review and only remedy for appellate level due process violations that undermine confidence in, and the legitimacy of, state court appellate systems. This Court must make it clear that a state court cannot deprive a citizen of a constitutionally-protected interest in a jury verdict without affording the due process protections of oral argument.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court established a three-part test to determine whether a pre-deprivation due process remedy is required in a given context. *Id.* at 335. The first part of the test evaluates the seriousness of the plaintiff's loss

if a pre-deprivation hearing is denied and erroneous deprivations can be challenged only through post-deprivation procedures. *Id.* The second part evaluates whether additional procedures will reduce the chance of error. *Id.* The third part of the test evaluates the governmental interest in denying a pre-deprivation hearing. *Id.* The *Matthews* test mandates oral argument before depriving a litigant of a favorable jury verdict.

Spiegel's loss was a serious one: the judgment in his favor had not only financial value, but the jury's verdict was an important public declaration of wrongdoing by Volvo. Moreover, due to serious issues of judicial immunity, post-deprivation remedies are practically non-existent. The immunity issues that Spiegel would face if he decided to sue the Illinois appellate justices for taking away his verdict are virtually insurmountable. The chances of convincing a federal court that judicial immunity does not apply are staggeringly small. (Counsel will not go so far as to claim that such an action would be frivolous, as he does not want to prejudice his client's right to attempt to pursue such claims if this Court denies review. But clearly there would be major hurdles, if not an outright bar, to pursuing post-deprivation remedies against the Illinois appellate court.) Moreover, it would be economically irrational to attempt to pursue such remedies, as they would most certainly cost more than $10,000 and cannot be feasibly pursued on a contingent-fee basis.

The second prong of the *Matthews* test considers the degree to which additional procedures would reduce the chance of error. Oral argument serves important

prophylactic purposes in preventing error due to, as in this case, basic misapprehensions about the record. Moreover, commentators have cited numerous benefits to oral argument, including: (1) to persuade judges, (2) to focus on one important matter, (3) to clarify facts, (4) to counter the oppositions arguments, especially in reply, (5) to legitimate the legal process, (6) to urge judges to read (or re-read) certain sections of the briefs, (7) to prepare judges for conference deliberations, and (8) to force judges to communicate with one another. Stephen Wasby, "The functions and importance of appellate oral argument: some views of lawyers and federal judges," pp. 352-355, in Judical Politics (Slotnick, Elliot, Eds.)

The Federal Judicial Center's lawyer survey showed that the majority of lawyers in each circuit studied agreed that "when a litigant is denied the right to have his lawyer argue his appeal, the litigant will feel that he has not had his day in court." *Id.* "Submission of briefs is not thought sufficient to assure lawyers and litigants that judges have focused on the case, because one could not be sure that the briefs were read." *Id.* As one commentator has noted, oral argument is "crucial for establishing human connection between bench and bar because it is the only face-to-face communication between attorneys and judges during a case's appellate course." *Id.* And as one Ninth Circuit judge noted, argument assists lawyers by "helping the judges to know who the attorneys are, as well as giving lawyers a notion of the orientation of the court and the way it is thinking." *Id.* The crucial role of the judge-attorney communication has often been stressed. According to William Hastie, who was a judge on the United States

Court of Appeals for the Third Judicial Circuit, "the oral argument is the Court's one chance to invite counsel to meet head on what seemed to be the strongest opposing contentions." *Id.* As noted by the Federal Judicial Center's survey, "oral argument permits the attorney to address himself to those issues which the judges believe are crucial to the case." *Id.*

Central to communication during appellate argument are the judge's questions. As one Ninth Circuit judge emphasized "the opportunity for oral argument provides for exploring doubts they had about the record and items not entirely clear." *Id.* He stated, "sometimes we can't understand until we ask questions." *Id.* Indeed, 90% of attorneys in the Federal Judicial Center survey agreed that "by asking questions of counsel, the judges are better able to avoid erroneous interpretations of the facts or issues in the case." *Id.* And Eight Circuit Judge Bright stated, oral argument "allows the judges to clear up any doubts the court might have about the case or the lawyer's approach to it." *Id.*

The third prong of the *Matthews* test – the governmental interest in denying the process – also militates in favor of review and reversal. Oral arguments at the state court level often take less than 10-15 minutes per side. Certainly it is worth this small investment of time by a panel of judges to hear argument before taking away a citizen's jury verdict. It is their job, after all, to hear and consider appeals. Moreover, the interest is much stronger in this case beause a litigant was deprived of a judgment and a jury verdict. Perhaps the state has a conceivable basis to

deny oral argument when affirming a verdict, but that is not the case here.

Under *Matthews* it was unconstitutional error to deprive Plaintiff of his jury verdict and judgment without oral argument. In *Federal Communications Commission v. WJR, The Goodwill Station*, 337 U.S. 265 (1949), this Court held under certain circumstances oral argument is constitutionally required, *id.* at 277, n.10 (citing cases). This case presents one of those circumstances. This Court has not examined the issue of oral argument as a due process requirement in over ½ a century. Appellate courts nationwide are denying oral argument in the name of judicial expediency. While this may not be a constitutional deprivation when a verdict is merely affirmed, it clearly is when a verdict is reversed.

CONCLUSION

Plaintiff urges this Court to grant review for the purpose of examining the issue of whether it is constitutional for a state appellate court to deprive a citizen of a favorable jury verdict without a hearing in the form of oral argument.

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December 8, 2006
No. 1-05-2789
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
SIXTH DIVISION

MARSHALL SPIEGEL,
Plaintiff-Appellee,

VOLVO CARS NORTH AMERICA, L.L.C.,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
No. 01 M1 149629
Honorable Francis J. Dolan, Judge Presiding.

ORDER

Defendant, Volvo Cars North America, L.L.C., appeals from a jury verdict in favor of plaintiff, Marshall Spiegel, in this breach of implied warranty of merchantability claim brought under the Magnuson-Moss Warranty Act (Act), 15 U.S.C. § 2301, et seq. Volvo contends that the trial court erred by denying its motion for judgment n.o.v. We reverse.

On September 24, 1998, Spiegel bought a 1995 Volvo C70 convertible from Towne and Countree Auto Sales, Inc., in Schererville, Indiana, a non-party. Spiegel received a limited warranty from Volvo. At the time of trial Spiegel continued to own and operate the car and had driven it about 70,000 miles.

On October 9, 2001, Spiegel filed a three-count complaint against Volvo under the Magnuson-Moss

warranty Act (Act), 15 U. S. C. Sec. 2301, et seq., alleging; (1) breach of limited warranty; (2) breach of implied warranty of merchantability; and (3) revocation of acceptance. The case proceeded to jury trial on June 17, 2004, on counts one and two. Spiegel testified that he bought the Volvo because "[i]t's known for being the safest car in the world that's what Volvo says and that's what their ads say, for life." Spiegel considered the car an investment testifying;

"[T]he Volvo name was supposed to be reliable and dependable and something, you know - you know, you could drive it, that they would stand behind their product and, you know, I would continue to enjoy it and drive it the usual hundred thousand miles I do when I go through most cars. Each car I've owned for many years have been - I rolled it over a hundred thousand miles. So I buy and own to grow old, like a stock or a piece of real estate."

But the car would periodically fail to accelerate, sputter and "starve for fuel" even when the tank still had as much as two to four gallons of gas. and the digital readout indicated there were as many as 50 miles to drive until empty. Spiegel tried to keep the tank full but it was not always possible. Spiegel testified that he did not feel safe driving his car stating;

"It's not safe. It's dangerous, It's very unsettling to be on a highway, just like you heard yesterday, trying to accelerate a car and the car doesn't have any acceleration. You know, if you're on the highway and you need to get around somebody or avoid a situation or whatever you might need acceleration, it's terrifying not to be able to have that with you," Spiegel testified

that the car sputtered, hesitated, and lacked acceleration, "when [he] didn't have time to whatever to keep the gas up," and that "if the car ran down to the last few gallons of gas, the car would either sputter, stop, or die," and that, "the car was stopping intermittently, sputtering, the same problem that I have been having all along. You know, if the gas - gas got below a certain level, the last few gallons or whatever, it would act like it's out of gas."

Spiegel testified that he and his son were once stranded on the highway when the car died in the express lanes. They waited for an hour for help as cars sped by them. He was afraid that he and his son would be struck by another vehicle as they sat waiting in the car. Another time he had to walk to a gas station and push the car.

Spiegel testified that he brought the car in to be serviced at various Volvo certified service centers 10 times since he purchased the car but none of the service centers could fix the problem. He started experiencing problems a few weeks after purchasing the car. He took the car in to authorized Volvo service centers in October 1998, March 1999, January 2000, February 2000, November 2004, December 2000, January 2001, May 2001, July 2001, and August 2001. The car was in service for a total of 70 days. Once, when Spiegel took the car its for service, he was told to keep the tank full.

Spiegel testified that he paid over $50,000 for the car (the bill of sale states the car was purchased for $46,560) but had he known of the car's problem he never would have purchased it because it was not safe. He usually droves a car about 20,040 miles a year but he only drove the Volvo about 12,000 miles a year

because of the problem with the fuel system. Spiegel did not take as many trips out of town as usual with the Volvo, his son gets "stressed out and feels unsafe in the car and his former wife refused to drive in the car and was "terrified of it" because of the acceleration problems. Over defendant's objection Spiegel answered his counsel's question, "What do you think the car is worth?" Plaintiff replied, "I probably would not have brought the litigation, if I paid maybe $25,000."

Spiegel presented the testimony of expert Torn Walters, are ASE certified master mechanic who had worked on luxury car like Spiegel's. Walters testified that he inspects vehicles for insurance companies "to verify the cause of the failure, the amount of damage and the best possibility for repair," Walters inspected Spiegel's car and replicated the alleged fuel starvation defect on a test drive. Walter stated that it was cold that day so he did not think vapor expansion. was an issue. Walters testified, that he drove the vehicle "at which time the vehicle engine began to starve for fuel or hesitate severely. I was at that point surprised because upon the miles to empty still indicate it had 25 miles to empty. The fuel gauge still registered in the two range or two gallons left in the tank range," "I felt that 2 gallons left in the fuel tank you should not be experiencing driveability issues at that point, that the fuel should be less than that in the tank before you might experience some type of hesitation or engine actually quitting." Walters opined that the fuel starvation problem affected safety because it could cause a lack of acceleration and power when ramping into traffic. Walters also opined that there was a defect with regard to the "fuel pump and/or pickup in the tank which caused abnormal cavitation with two gallons

remaining in the tank." Walters concluded testifying that "two gallons should have been more than sufficient for normal operation," that the time he replicated the defect and "under normal circumstances that would not be correct. I felt that the vehicle should have still provided normal operation with two gallons of fuel left in the tank." Walters also stated that Spiegel could have avoided the problem by always refilling his gas tank.

Volvo presented evidence that its limited warranty provided in part, that it did not cover "[t]he loss of vehicle use, loss of time, telephone calls, towing, lodging, car rental, food, and other incidental and consequential damages." Spiegel acknowledged that the car's owner's manual stated;

"The fuel tank is designed to hold approximately 18.5 U.S. gallons * * * with sufficient volume left over to accommodate possible expansion of the fuel in hot weather. Be aware that the usable tank capacity is somewhat less than the specified maximum. When the fuel level is low, such factors as ambient temperature, the fuel's `vapor pressure' characteristics, and terrain can affect the fuel pumps' [sic] ability to supply the engine with an adequate supply of fuel. Therefore, it is advisable to refuel as soon as possible when the needle nears the red zone, or when the fuel warning light comes on."

Volvos' expert, Christopher J. Densley, a Volvo product follow-up engineer, testified that fuel starvation may occur when a car is run very low on fuel and may result in engine misfires, loss of performance, or a stall. Densley reviewed and analyzed the repair orders for the car, and inspected, tested and evaluated

the car, in particular, its fuel tank. The car had a maximum capacity of 18.5 gallons with a usable capacity of 16.65 gallons allowing for fuel vapor expansion. Densley testified that Spiegel and he tried to recreate the problems during a test drive. But, the problems occurred only when the gauge read empty and the trip miles indicator read zero, Densely explained:

"As [Spiegel] demonstrated to me on the test drive *** he's getting the sputtering and starving under acceleration. And this goes back to what we described a few moments ago where you have a fairly large tank with a very flat bottom. Under acceleration, the fuel will slosh to the back of the tank. If you have a long acceleration and that fuel remains stuck against the back of the tank the fuel pickup which is located centrally in the tank can't get at that fuel and has trouble supplying fuel to the engine." * * * you'll get misfires, you'll get loss of performance and obviously, ultimately its possible to get a stall."

Densley opined that the car's fuel tank was "not defective in any way, shape, or form" and that engine fuel starvation occurred because of the car being run on very low fuel.

Volvo moved for a directed verdict. The trial court denied Volvo's motion and submitted both counts to the jury. The jury found to favor of Spiegel on the implied warranty of merchantability claim and in favor of Volvo on the breach of limited warranty claim and awarded Spiegel $10,680; $7,300 for diminished value, $680 for loss of use, and $2,700 for aggravation and inconvenience. The trial court denied Volvo's motion for judgment n. o. v. and found in favor of Volvo on

Spiegel's revocation of acceptance claim. The trial court then awarded attorney fees and costs to Spiegel in the amount of $31,479.30. This timely appeal followed.

On appeal, Volvo contends that the trial court erred by denying its motion for judgment n. o. v. because Spiegel failed to establish a prima facie case of breach of implied warranter of merchantability.

A judgment n. o. v. may be granted only when all of the evidence, when viewed in a light most favorable to the plaintiff, so overwhelmingly favors the defendant that no contrary verdict based on that evidence could ever stand. Pedrick v. Peoria & Eastern R.R. Co., 3 7111. 2d 494, 510 (1967). A motion for judgment n. o. v. presents a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences. from it, there is a lack of evidence to prove any necessary element of the plaintiff's case. York v. Rush Presbyerian-St. Luke's Medical Center, 222 Ill. 2d 147,178 (2006). If reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented, judgment n. o. v. must not be entered. York, 222 Ill. 2d at, 178. A reviewing court cannot usurp the function of the jury by substituting its judgment on questions of fact which are reasonably supported by both parties. York, 222 Ill. 2d at, 178. We review de novo the circuit court's decision denying defendant's motion for judgment n. o. v. York, 222 Ill. 2d at, 178.

In order to prove breach of implied warranty of merchantability, the plaintiff must show; (1) a defect; (2) existing at the time the car left the manufacturer's control; (3) rendering it unfit for the ordinary purposes for which a car is used; and, (4) damages. 810 ILCS 5/2-

314 (west 1998); Tweedy v. Wright Ford Sales, Inc., 64 Ill. 2d 570, 574 (1976) (elements one - three); Kim v. Mercedes-Benz, U.S.A. Inc, 353 Ill. App. 3d 444, 460 (2004) (element four).

Volvo argues, inter alia, that Spiegel failed to prove damages. Damages are an essential element of the prima, facie case for breach of warranty. Kim, 353 Ill. App, 3d at 460.

Without damages there can be no recovery." Valenti v. Mitsubishi Motor Sales of America Inc., 332 Ill, App. 3d 969, 973 (2002). The plaintiff does not have to calculate damages far breach of warranty with mathematical precision but basic contract theory requires that damages be proved with reasonable certainty, precluding damages based on mere conjecture or speculation. Razor v. Hyundai Motor America, 222 Ill. 2d 75,106-07 (2006). The measure of damages for a breach of warranty claim is the difference between the value of the property as warranted and the actual value on the date of the breach. Razor, 222 Ill. 2d at 106-07. The plaintiff bears the burden of establishing the correct measure of damages. Valenti, 332 Ill. App. 3d at 973. A lay witness may give testimony regarding the diminished value of personal property. Kim, 353 Ill, App. 3d at 455. "To establish an appropriate foundation as to the value of personal property, the lay witness, at a minimum, should be able to testify as to the following factors: (1) familiarity with the property in question; (2) actual knowledge of the value of the subject property; and (3) the basis of the knowledge of that value, i.e., how, when and where the witness obtained the knowledge." Kim, 353 Ill. App. 3d at 456-57.

In this case, Spiegel failed to establish the second and third factors of the Kim test" Spiegel testified only that if he had paid $25,000. for the car he would not have brought the law suit. He did not state any basis for this figure. while he did state that he drove the car only 12,000 miles instead of the usual 20,000 miles and took fewer trips than he would like, these are speculative bases for determining the value of the defective car upon purchase. There was no evidence that the car could not have gone on these trips or could not have been driven 20,000 miles a year with the defect. In fact, plaintiff testified that he had driven the car about 70,000 miles at the time of trial. Thus, Spiegel failed to prove the value of the defective car, even when viewed in a light most favorable to Spiegel, and thereby failed to prove a prima facie claim of breach of implied warranty of merchantability, Accordingly, the trial court erred by denying Volvo's motion for judgment n.o.v. on the breach of implied warranty of merchantability claim.

Spiegel attempts to distinguish Kim by noting that the plaintiff failed to comply with Supreme Court Rule 21 regarding disclosure of a witness. 177 Ill. 2d R. 13. Yet, Spiegel ignores the fact that the Kim court discussed the foundation issue regardless of its discussion of the Rule 213 issue. Kim, 53 Ill. App. 3d at 455. Thus, the Kim factors apply here.

Spiegel also contends that his expert Tom Walters offered testimony regarding diminished value but cites to nothing in the record. Therefore, this argument is waived. 188 Ill. 2d R. 341 (e) (7).

Because we have reversed on the basis that Spiegel failed to prove damages and thus failed to prove a prima facie claim of breach of implied warranty of merchantability we need not address the other issues raised by Volvo on appeal.

Reversed.
FITZGERALD SMITH, P.J., with McNULTY and O'MALLEY, JJ., concurring.

SUPREME COURT OF ILLINOIS
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May 31, 2007

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No. 104286 - Marshall Spiegel, petitioner, v. Volvo Cars North America, LLC, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENTED the petition for leave to appeal in the above entitled cause.

Fitzgerald, J., took no part .

The mandate of this Court will issue to the Appellate Court on July 6, 2007.

June 21, 2004
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Marshall Spiegel

v.

Volvo Cars of North America

ORDER

This cause before the Court for trial, a verdict having been returend, and the jury having been polled, now therefore

It is hereby ordered that Judgment is hereby is hereby entered on the verdict as follows:

1. As to Count I, Judgment is entered in favor of Defendant and aginst the Plaintiff,

2. As to Count II, Judgment is entered in favor of Plaintiff and against the Defendant

3. Damages are awarded and judgment is entered in the amount of $10, 680, as itemized in the verdict.

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-573

In the Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

VOLVO CARS OF NORTH AMERICA, LLC,

Respondent.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1.

Below, the Illinois Appellate Court reversed a judgment in a breach of warranty action, without oral argument, finding that the plaintiff-petitioner failed to prove damages, an essential element of his *prima facie* case. Without directly saying so, plaintiff here contends that the appellate court's application of Illinois Supreme Court Rule 352 – which authorizes a reviewing court to dispose of a case without oral argument where it finds "no substantial issue" – violated his Fourteenth Amendment right to procedural due process. Plaintiff did not present, and the courts below did not pass on the constitutional argument raised here. Did the plaintiff adequately preserve his constitutional claim for review by this Court?

2.

Independent sources, such as state law, create and define what constitutes a "property interest;" the Constitution does not. Illinois law does not recognize a property interest in a judgment subject to appellate review. Did the trial court's money judgment in plaintiff's favor create a property interest entitled to protection under the Fourteenth Amendment's Due Process Clause?

Corporate Disclosure Statement

Defendant-respondent Volvo Cars of North America, LLC, a Delaware limited liability company, has one member, Ford Motor Company, a publicly traded company.

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Rule Involved

Illinois Supreme Court Rule 352(a) provides in relevant part:

> (a) **Request; Waiver; Dispensing With Oral Arguments.** * * *
>
> After the briefs have been filed, the court may dispose of any case without oral argument if no substantial question is presented, but this power should be exercised sparingly.
>
> * * *

(The rule's complete text is reproduced in the appendix.)

Statement of the Case

Plaintiff-petitioner Marshall Spiegel ("Spiegel" or "plaintiff") filed a breach of warranty complaint against Defendant-respondent Volvo Cars of North America, LLC ("Volvo") in Illinois state court alleging claims under the Magnuson-Moss–Federal Trade Commission Warranty Improvement Act ("the Act"), 15 U.S.C. § 2301, *et seq.*, for breach of written and implied warranty and revocation of acceptance arising out of his purchase of a Volvo automobile. (App. 1.)

At trial the jury found for plaintiff on his implied warranty claim and awarded damages totaling $10,680.00, consisting of $7,300 for diminished value, and incidental and consequential damages of $680 for loss of use, and $2,700 for aggravation and inconvenience. (App. 41.) The trial court entered judgment on the verdict.[1] It later amended the judgment to include an award for attorney's fees and costs under § 110(d) the Act, 15 U.S.C. § 2310(d), in the amount of $31,479.30. (*lbid.*) The trial judge denied Volvo's motion for judgment notwithstanding the verdict on the implied warranty claim, which if granted would have required that the fee and cost award be vacated. (*lbid.*) Volvo appealed and posted an appeal bond to stay enforcement of the judgment. (C1132-35; C1155.)

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[1] The jury found for Volvo on the written warranty claim and the trial court subsequently found for Volvo on the revocation of acceptance claim. (App. 41.) Plaintiff did not appeal either of these findings.

The Illinois Appellate Court reversed. And contrary to the representations made in the Petition, it did so "on the basis that Spiegel failed to prove damages and thus failed to prove a prima facie claim of breach of implied warranty of merchantability." (App. 44.)[2]

Spiegel filed a petition requesting the appellate court to rehear the case, claiming, *inter alia*, that it improperly invoked Illinois Supreme Court Rule 352. (App. 3-12.) The rule allows a case to be decided without oral argument where the court finds "no substantial issue." (App. 1.) Spiegel claimed that the case involved substantial issues. He also included an assertion that oral argument was "constitutionally required as a matter of due process." (App. 10.) But as the passage set out below amply demonstrates, Spiegel did not support his "constitutional" contention with substantive argument or analysis, citation to authority, or identify whether he sought redress under the Federal or Illinois Constitution:

> "[Illinois] Supreme Court Rule 352 cautions that cases should be taken without oral argument "sparingly." Plaintiff believes that the issues presented in this case are "substantial" and that oral argument is appropriate and constitutionally required. This Court's order has deprived Plaintiff of a jury verdict and his counsel has been deprived of compensation for hundreds of hours of work. Taking a case

---

[2] The Petition inaccurately claims that the appellate court reversed "on the basis that the diminished value evidence was admitted without proper foundation." (Pet. at 2.)

> without oral argument and reversing is qualitatively different than taking a case without oral argument and affirming, especially when the reversal entails taking away a jury verdict in which there exists a constitutionally-protected property interest. Plaintiff believes that in a case such as this oral argument is constitutionally required as a matter of due process.

(App. 10.) After the appellate court denied his request for rehearing, Spiegel petitioned the Illinois Supreme Court for leave to appeal. (App. 13-45.) In this petition Spiegel reiterated his assertion that the constitution required the appellate court to conduct oral argument but again presented no substantive argument or analysis and cited no authority. (App. 30-31.) Instead, Spiegel merely repeated the paragraph excerpted above. (*Ibid.*) The Illinois Supreme Court denied Spiegel's petition. (Pet. at 11a.)

Reasons For Denying The Petition

1. Plaintiff Did Not Present His Fourteenth Amendment Due Process Claim To The Illinois Courts And Thus Did Not Preserve The Claim For Review By This Court.

The Supreme Court should not exercise its appellate jurisdiction in a case where a federal question was "not pressed or passed upon" in the lower courts. *Illinois v. Gates*, 462 U.S. 213, 218-19 (1983). Because Spiegel did not present a federal claim to the Illinois courts the Petition should be denied. 28 U.S.C. § 1257. *See, e.g., Howell v. Mississippi*, 543 U.S. 440, 446

(2005); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969).

Plaintiff did not urge the courts below to find that the Fourteenth Amendment's Due Process Clause requires oral argument in this or any other case. (*See* App. 10; App. 30- 31.). Indeed, he did not even cite the Fourteenth Amendment or its Due Process Clause in either his Petition for Rehearing or his Petition for Leave to Appeal. (App. 10; App. 30- 31.).[3] A vague appeal to constitutional principles does not preserve an issue for review. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). Spiegel's generalized invocation of "due process" and "constitutional" concerns do not amount to presenting a federal question to the Illinois courts. *Howell*, 543 U.S. at 442, n.2 (collecting cases). A party cannot generally invoke the Constitution and wait until proceeding before the Supreme Court of the United States to specify the constitutional provision at issue. *Id.* This is particularly important where, as here, a state statute or rule is challenged and the state courts have not been given an opportunity to interpret the rule or statute. *Gates*, 462 U.S. at 218-19 (*quoting McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1940)).

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[3] Rather, Spiegel argued that the Illinois Appellate Court improperly applied Illinois Supreme Court Rule 352 by issuing its ruling without entertaining oral argument in a case involving "substantial issues."(App. 10; App. 30- 31.).

And because Spiegel did not properly present the due process question he now raises to the lower courts, an inadequate record exists to enable this Court to address the issue. *Cardinale*, 394 U.S. at 439 (finding that the record is likely to be inadequate to determine issues not presented to the lower courts).

Finally, Spiegel's filings below do not make clear that he raised *federal* constitutional issues before the Illinois courts. "At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981) (emphasis original). The Illinois Constitution contains its own Due Process Clause. Ill. Const. art. 1 § 2. So even if Spiegel properly raised a constitutional challenge in his state court briefs, the courts below may have interpreted it to be a challenge under the Illinois Constitution. *Bankers Life & Cas. Co.*, 486 U.S. at 78.

Because Spiegel failed to properly raise his federal due process claim in the Illinois courts, he failed to preserve it for consideration by this Court and his Petition should be denied.

2. Plaintiff Cannot Meet The Threshold Requirement Of Demonstrating A "Property Interest" Entitled To Due Process Protection.

In addition to his failure to properly raise and preserve his federal due process claim below, plaintiff

faces a second insurmountable hurdle; he cannot satisfy the threshold requirement of demonstrating a protected property interest.

Procedural due process requirements apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). Spiegel does not claim deprivation of a liberty interest. Instead, he contends that the Illinois Appellate Court deprived him of property, specifically "[a] judgment entered on a jury verdict." (Pet. at 3.) However, plaintiff presents absolutely no case law authority to support his contention. Nor does he offer any effective rebuttal to the well-established due process and related state law jurisprudence that negates the unqualified equation of a jury verdict and resulting judgment that is being reviewed by a state appellate court with a due process "property interest." Consequently, despite his request to this Court to consider whether the Fourteenth Amendment's Due Process Clause requires a state appellate court to provide a plaintiff-appellee an opportunity to present oral argument before the court reverses a lower court's award of money damages, the plaintiff in this case cannot, for purposes of his own claim, meet the threshold requirement of demonstrating a "property interest" entitled to due process protection. For that additional reason, his Petition should be denied.

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. *Board of Regents v. Roth,* 408 U.S. at 576. The proce-

dural component of the Due Process Clause does not protect everything that might be described as a "benefit." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005), *citing Roth*, 408 U.S. at 577. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it, or a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Id.*

As this Court has frequently explained, such entitlements are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *Town of Castle Rock*, 545 U.S. at 756, *citing Paul v. Davis*, 424 U.S. 693, 709 (1976) (*quoting Roth*, 408 U.S. at 577).

Here, the underlying jury verdict and judgment that plaintiff characterizes as his "property interest" were entered during the course of litigation pending in an Illinois state court. The alleged due process violation occurred during the appellate phase of that very litigation. Thus, Illinois law provides the relevant legal framework for determining whether plaintiff had a "property interest" in the verdict and judgment.

Under Illinois law, a judgment that is in the process of being appealed is not a "final judgment." *In Re Marriage of Duggan*, No. 2-06-0061, 2007 WL 3051995 *4 (Ill. App. Oct. 16, 2007). A judgment becomes a vested right of property once it is no longer subject to review or modification. *Id. citing Evans v. City of Chicago*, 689 F.2d 1286, 1296 (7thCir. 1982), overruled on other grounds, 873 F.2d 1007 (7thCir. 1989). A

"vested right" is a complete and unconditional demand or exemption that may be equated with a property interest. *First of America Trust Company v. Armstead*, 171 Ill.2d 282, 664 N.E.2d 36, 40 (1996).

These principles compel the conclusion that the jury verdict and lower court judgment in the present case did not create a "property interest" since, at the time the appellate court allegedly deprived plaintiff of his "property," the verdict and judgment were still on appeal and subject to review or modification. Because the judgment had not yet become final at the point of reversal, plaintiff had not acquired any vested right tantamount to a property interest.

Illinois law also provides that the enforcement of a judgment for money only shall be stayed if a timely notice of appeal is filed and an appeal bond or other form of security is presented to, approved by, and filed with the court. Illinois Supreme Court Rule 305(c). In this case, Defendant timely filed its notice of appeal and appeal bond (C1132-35; C1155) and plaintiff's Petition does not challenge the efficacy thereof. Since plaintiff was thereby stayed from enforcing the underlying judgment, he acquired no vested right to immediate payment of that judgment, and thus no "property interest."

The rules governing procedures in Illinois' appellate courts provide no basis for asserting a vested property right to present oral argument during an appeal from a lower court money judgment. Illinois Supreme Court Rule 352(a) permits a reviewing court to dispose of any case without oral argument if no substantial question is presented. Furthermore, Illinois courts

"have long recognized that 'there can be no vested right in a particular remedy or method of procedure.'" *White v. Sunrise Healthcare Corporation*, 295 Ill.App.3d 296, 300, 692 N.E.2d 1363 (1998), *citing Chicago & Western Indiana R.R.Co. v. Guthrie*, 192 Ill. 579, 581, 61 N.E. 658 (1901). Here, after the parties had been allowed to submit, as the Petition acknowledges, "extensive and comprehensive briefs on a number of important issues" (Pet. at 4), the appellate court determined that the plaintiff had failed to establish at trial all the requisite elements of his breach-of-warranty cause of action. This was hardly a novel, unique, or substantial question. Thus, the appellate court's chosen method of deciding this particular appeal was fully consonant with Illinois' rules governing appellate procedure.[4]

Given plaintiff's failure to demonstrate an underlying substantive property interest created by Illinois law, his federal Due Process claim necessarily fails. Even if his petition could be read as showing an "underlying substantive interest under state law," his claim must nonetheless be rejected for failing to demonstrate, as a matter of federal constitutional law, that his interest rises to the level of a "legitimate

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[4] Though plaintiff also criticizes the appellate court for rendering its ruling in an unpublished order, Rules 23(b) and (e) of the Illinois Supreme Court Rules expressly sanction disposition of an appeal in this fashion. Furthermore, plaintiff's invitation to this Court to enter "the larger controversy regarding unpublished opinions generally" (Pet. at 4), is little more than a red herring, particularly when his "Questions Presented" and "Conclusion" focus exclusively on his claim of constitutional entitlement to oral argument.

claim of entitlement" protected by the Due Process Clause. *Town of Castle Rock*, 545 U.S. at 756 ("Although the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause") (emphasis in original), *citing Memphis Light Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). Here, Plaintiff is claiming an entitlement to oral argument. However, this Court has previously held that an entitlement to nothing but procedure cannot be the basis for a property interest. *Town of Castle Rock*, 545 U.S. at 764; *id.* at 770-72 (Souter, J. concurring.)

Furthermore, plaintiff's reliance upon *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478 (1988), *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (see Pet. at 3), for purposes of establishing his "property interest" is misplaced. Plaintiff is not claiming he was deprived of property by being deprived of the opportunity to bring a cause of action. The record amply negates any such notion. Instead, the cornerstone of his position is that the verdict and judgment are, in and of themselves, his "property," a proposition that none of these cases addresses or supports.

Nor does it follow, as plaintiff suggests without citation to authority, that a verdict and judgment must certainly be a property right *because* "a mere cause of action is a property right." (Pet. at 3.) If that were so, then by logical extension, every non-final ruling in every state court lawsuit would be "property"

subject to Due Process scrutiny and protection. Illinois courts, however, have chosen to include only final judgments within the sphere of vested property rights, a determination consistent with this Court's prior due process decisions such as *Town of Castle Rock*, *Paul v. Davis*, and *Board of Regents v. Roth*, discussed *supra*. Furthermore, plaintiff's Petition fails to demonstrate any significant conflict between Illinois and other states on the question of which court judgments give rise to property interests, and when and under what circumstances, does that occur.

Conclusion

For these reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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Full text of Illinois Supreme Court Rule 352.

Rule 352. Conduct of Oral Arguments

(a) **Request; Waiver; Dispensing With Oral Arguments.** A party shall request oral argument by stating at the bottom of the cover page of his or here brief that oral argument is requested, or, if the party has allowed a petition for leave to appeal or answer to stand as his or her brief, by mailing to the clerk and to opposing parties, within the time in which the party could have filed a further brief, a notice requesting oral argument. If any party so requests, all other parties may argue without an additional request. No party may argue unless that party has filed a brief as required by the rules and paid any fee required by law. A party who has requested oral argument and who thereafter determines to waive oral argument shall promptly notify the clerk and all other parties. Any other party who has filed a brief without requesting oral argument may then request oral argument upon prompt notice to the clerk and all other parties.

After the briefs have been filed, the court may dispose of any case without oral argument if no substantial question is presented, but this power should be exercised sparingly.

(b) **Length.** Unless the court otherwise orders, in a capital case each side shall be allowed not to exceed 30 minutes for its main argument. In a noncapital case, each side shall be allowed not to exceed 20 minutes for its main argument. In all cases, the appellant shall have not to exceed an additional 10 minutes strictly confined to rebuttal. If only one side

argues, the argument shall not exceed 15 minutes. The court may grant additional time on motion filed in advance of the date fixed for hearing if it appears that additional time is necessary for the adequate presentation of the case. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) **Reading Prohibited**. Reading at length from the record, briefs, or authorities cited will not be permitted.

(d) **Divided Arguments**. No more than two counsel will be heard from each side except by leave of court, which will be granted when there are several parties on the same side with diverse interests. Divided arguments are not favored and care shall be taken to avoid duplication of arguments.

(e) **Multiple Parties**. If a case involves appeals by more than one party the sequence of oral argument shall be as the parties agree or as the court directs.

(f) **Limitation on Briefs and Memoranda**. No brief or memorandum shall be filed after the due date of the reply brief or after oral argument except by leave of court or a judge thereof.

(g) **When Oral Argument Not Requested**. If a case is submitted to the court without request for oral argument, it shall be decided on the briefs unless the court orders oral argument.

App. 3

No. 05-2789

In the
Appellate Court of Illinois
First Judicial District

MARSHALL SPIEGEL,

Plaintiff-Appellee,

v.

VOLVO CARS NORTH AMERICA, LLC,

Defendant-Appellant,

Appeal from the Circuit Court of Cook County,
Illinois Municipal Department, No. 01 M1 149629
The Honorable Francis J. Dolan, Judge Presiding

SPIEGEL'S PETITION FOR REHEARING

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1. In its order dated 12/8/06 this Court overlooked the fact that Defendant did not make a motion for a new trial and that the proper relief for improper admission of evidence is a new trial, not judgment *nov*.

Defendant argued in its opening brief that "over objection" Plaintiff was "allowed to testify" regarding the diminished value of his car and that the trial court should have "excluded" the testimony because it "lacked a foundational basis." (Def's Brf. at 13.) In this regard, Defendant cited to *Kim*, block-quoting a section of the opinion that begins "to establish an appropriate foundation... [plaintiff must show three things]." (*Id.*) In other words, the Defendant's appeal on this issue was that the trial court made an evidentiary error and admitted evidence without an adequate foundation.

In its order dated December 8, 2006, this Court agreed that the foundation was inadequate, stating: "Spiegel failed the second and third factors of the *Kim* test" because he "did not state any basis" for his evidentiary conclusion regarding the vehicle's value. (Order, p. 8.) But the trial judge, after hearing argument at sidebar, concluded differently. Having listened to the entirety of Spiegel's testimony, the trial judge concluded Plaintiff had, in fact, stated a basis for his valuation testimony and thus he overruled Defendant's foundation objection. (C934.) Without expressly applying an abuse-of-discretion standard,

this Court concluded the trial court erred in making this evidentiary determination.[1]

The proper remedy for a trial court's evidentiary error, however, is not to discard the entire verdict and enter judgment in favor of the Defendant. When a litigant believes evidence has been improperly admitted against it, the law allows for the aggrieved party to move for a new trial.[2] Defendant did not avail itself of the opportunity to seek a new trial as a result of the claimed evidentiary error. Instead, Defendant chose to solely move for judgment notwithstanding the verdict on a variety of legal grounds, such as the privity requirement and its disclaimer of liability for consequential damages.

While Defendant has attempted to avoid the consequences of failing to move for a new trial by trying to characterize the trial judge's error in admitting evidence as plaintiffs failure to make a *prima facie* case, the law does not allow Defendant to do so. As Plaintiff argued in his opening brief:

> It is important to stress that Defendant never moved for a new trial and therefore waived its arguments about evidentiary error in connection with the determination of damages. As the appellate court explained in *Bryant v. Livigni*, "This objection has been waived. **National has**

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[1] The Court stated that the standard of review on a jnov is, of course, *de novo*. But the evidentiary question still remains an abuse of discretion standard. The fact that Defendant called what should have been a new trial motion a jnov does not mean they should get to change the standard of review.

[2] *Bryant a Livigni*, 250 Ill. App. 3d 303, 310 (5th Dist. 1993).

> **not requested a new trial. It has requested judgment *nov*,** an outright reversal. **In such a case, error in the admission or rejection of evidence is not preserved for review."**[3] Here, Defendant did not move for a new trial because Spiegel's testimony regarding damages was improper or because damages were improperly awarded. Judgment *nov* was the not the proper mechanism to make such challenges and Defendant has not sought a new trial on these points.

While Plaintiff does not agree with this Court's decision regarding the sufficiency of the foundation laid at trial, Plaintiff wants to stress that the purpose of this petition is not to quibble about the sufficiency (or insufficiency) of Spiegel's foundation. Plaintiff is well-aware that Rule 367(b) says that re-argument of the case is not the purpose of rehearing. Nevertheless — and especially because Plaintiff was deprived for the benefit of oral argument — Plaintiff believes that rehearing is required because, even if Plaintiff were to agree that the foundation was inadequate, the only legally permissible remedy is a new trial, not jnov. And this Court cannot grant a new trial because Defendant never asked for one.

Moreover, Plaintiff files this petition to point out — and give this Court the opportunity to remedy — the profound llnfairness and injustice in depriving Spiegel of his entire jury verdict because the trial court erroneously agreed that his foundation was accept-

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[3] 250 Ill. App. 3d 303, 310 (5th Dist. 1993)(emphasis added).

able. This precise injustice was not lost on the Supreme Court in *Razor*, where the Court stated, "Accordingly, **although plaintiff's case failed for proof of damages, it would be entirely unjust to reverse the verdict outright.** As previously noted, "[w]here the right of recovery exists the defendant cannot escape liability because the damages are difficult to prove."[4]

Finally, it is longstanding jurisprudence in Illinois and nationwide that litigants should be given an opportunity to remedy a defective foundation.[5] Had

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[4] *Razor*, 222 111. 2d 75, 108 (2006)(emphasis added).

[5] *See e.g., Rios v. City of Chicago*, 331 Ill.App.3d 763 (2002)("the trial court erred in **admitting evidence without a proper foundation**, ... we fmd these errors to be sufficiently prejudicial to warrant reversal and remand for a **new trial**."); *Bafia v. City Intern. Trucks, Inc.*, 258 Ill.App.3d 4 (1994) ("a foundational objection was made irrelevant. Plaintiff would not have been given an **opportunity** to confront the objection or to **remedy any alleged lack of foundation**"); *Ashford v. Culver City Unified School Dist.*, 29 Cal.Rptr.3d 728 (2005) (holding **"the proper remedy"** is to remand to provide an **"opportunity to present authentication"** because "if a proper foundation had been laid, the weight of the evidence would have supported the findings..."); *State v. Biddle*, 652 N.W.2d 191 (Iowa 2002.) (a party objecting to the offer of evidence for this reason [no proper foundation laid] must point out in what particular or particulars the **foundation is deficient** so the adversary may have an **opportunity to remedy the alleged defect**); *May v. Sprynczynatyk*, 695 N.W.2d 196 (2005) ("May effectively deprived the Department of the **opportunity to remedy any alleged defect in foundation** for exhibit"); *Brooks v. SSM Health Care*, 73 S.W.3d 686 (2002) (alleged error is waived if the motion is made too late to give opposing counsel an **opportunity to fix any deficiencies** in the question **or lay an appropriate**

(continued...)

Defendant's objection been sustained at trial — as this Court's order indicates it should have been — Plaintiff would have been given the opportunity to lay a better foundation and show the basis of his knowledge in further detail. Spiegel should not suffer a penalty because an objection was sustained on appeal, rather than by the trial judge.

Indeed, on the topic of rental value the trial judge initially sustained a foundation objection, but then overruled it after Plaintiff laid an addition three pages of foundation. This brings Plaintiff to his second argument for rehearing, which is that even if the value evidence is totally excluded and disregarded Plaintiff still made a prima facie case because he introduced evidence of — and the jury awarded damages for — loss of use of the vehicle as well as aggravation and inconvenience.

2. Even if Spiegel's testimony regarding diminished value is discarded, Plaintiff still made a *prima facie* case because he introduced evidence of damages of loss of use and aggravation of inconvenience — for which the the jury awarded $380 and $2700, respectively — accordingly, there was *some* evidence of damages and jnov improper.

As this Court is well aware and as the Order correctly noted, jnov is improper if there is <u>any evidence</u>

(...continued)
foundation for the witnesses' opinion.")

on each element of the claim. The 12/8/06 Order overlooks that even if the $25,000 diminished value figure is discarded, Spiegel still introduced evidence and was properly awarded by the jury damages for loss of use and aggravation and inconvenience. Spiegel laid a detailed foundation regarding his experience regarding the rental of similar cars (C938-939) and was awarded $380 in loss of use by the jury.

The loss of use evidence alone is some evidence of damages and sufficient to defeat jnov, but Plaintiff also introduced and was awarded $2,700 in damages for aggravation and inconvenience.[6] The Supreme Court in *Razor* specifically affirmed the award of aggravation and inconvenience damages (even as it discarded and remanded for a new trial on diminished value damages). Accordingly, this too is sufficient to defeat a jnov.

The December 8, 2006 Order did not address the aggravation and inconvenience or loss of use damages. Because this was overlooked by the Court, Plaintiff respectfully requests rehearing.

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[6] Given the 10 repair attempts and the time that Spiegel and his son were stranded on the highway (C 940-942.), $2,700 is not and unreasonable amount to award, for instance this works out to $200 per repair attempt and $700 for the highway incident. In any event, the quantum of damages is not being challenged by the Defendant (who never sought remititur and is not a proper inquiry on a jnov).

3. Plaintiff requests oral argument on rehearing because Plaintiff did not receive one on the initial appeal.

Supreme Court Rule 352 cautions that cases should be taken without oral argument "sparingly." Plaintiff believes that the issues presented in this case are "substantial" and that oral argument is appropriate and constitutionally required. This Court's order has deprived Plaintiff of a jury verdict and his counsel has been deprived of compensation for hundreds of hours of work. Taking a case without oral argument and reversing is qualitatively different than taking a case without oral argument and affirming, especially when the reversal entails taking away a jury verdict in which there exists a constitutionally-protected property interest. Plaintiff believes that in a case such as this oral argument is constitutionally required as a matter of due process.

In its 12/8/06 Order this Court did not make any findings regarding whether the appeal presents "substantial issues." If the appeal presents a substantial issue, then Rule 352 does not allow disposition without oral argument. The issue presented in *Kim* and *Razor* regarding lay testimony of diminished value is substantial and complex, and there still exists confusion in the trial courts as to what foundation is required. Given this Court's ruling regarding foundation requirements it seems that no case can be proven without an expert opinion on diminished value. This would impose a prohibitive cost burden on a consumer's ability to seek redress for warranty violations, a result exactly opposite the stated goals of warranty and consumer protection law.

Plaintiff respectfully submits that this case presents substantial issues regarding redress for violations of consumer protection law and thus oral argument is required. In any event, Supreme Court Rule 352 says even when cases present no substantial issues they should be disposed of without oral argument only "sparingly."

The confusion in this case stems from a tactical decision made by Defendant. Defendant never moved for a new trial, which is what is should have done if it believed the trial court's evidentiary were wrong. If Defendant had done so, the issues would have been more clearly presented and this Court would most likely be remanding for a new trial right now.

But the complexity (and the confusion) arises because Defendant never asked for a new trial. Defendant made the strategic choice to only go for a jnov. Indeed, Defendant spent most if its brief arguing the legal issues that would presumably justify a jnov. The "damages issue" presented by the Defendant was only 2 pages in its 29 page brief. In any event, it was not properly included in Defendant's brief because even if the Defendant is correct in its argument — as this Court seems to have found it was — it still cannot get jnov. Defendant made a tactic choice to try to shoehorn this issue in the appeal even though it never moved for a new trial. Plaintiff should not lose his verdict because Defendant waived its rights.

WHEREFORE, for all the following reasons, Plaintiff respectfully requests a rehearing.

(1) This Court overlooked that even if the foundation for Spiegel's testimony was inadequate the only

permissible remedy would be a new trial, which Defendant never requested;

(2) Even without Spiegel's testimony, there was remained some evidence of damages, specifically for loss of use and aggravation and inconvenience; and

(3) The issues presented in the appeal are "substantial" and Supreme Court Rule 352 does not authorize disposition without oral argument.

Respectfully submitted,

MARSHALL SPIEGEL, Plaintiff-Appellee

_____

By One of His Lawyers

RULE 341 CERTIFICATION

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix, is 8 pages.

Christopher V. Langone, Esq.
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No.

In the
Supreme Court of Illinois

MARSHALL SPIEGEL,

Plaintiff-Appellant,

VOLVO CARS NORTH AMERICA, LLC,

Defendants-Appellees.

Petition for Leave to Appeal from the Appellate Court of Illinois, First District

---

No. 05-2789

There Heard on Appeal from the Circuit Court of Cook County, Illinois, County Department, Municipal Division

---

No. 01 M1 149629

The Honorable Dolan, Judge Presiding

PETITION FOR LEAVE TO APPEAL

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ORAL ARGUMENT REQUESTED

No.

In the
Supreme Court of Illinois

MARSHALL SPIEGEL,
Plaintiff-Appellant,

VOLVO CARS NORTH AMERICA, LLC,
Defendants-Appellees.

PETITION FOR LEAVE TO APPEAL

PRAYER FOR LEAVE TO APPEAL

Plaintiff-Appellant Marshall Spiegel prays for leave to appeal from the appellate court entered on December 8, 2006. A petition for rehearing was filed on December 29, 2006. The appellate court denied the petition on January 10, 2006.

PROCEDURAL HISTORY BELOW

Plaintiff, Marshall Spiegel brought this action on October 9, 2001 against Volvo Cars North America, LLC for breach of warranty. The case proceeded to trial. On June 21, 2004, a jury found for Spiegel and awarded him $10,680.00 -- $7300 for diminished value; $2700 for aggravation and inconvenience and $380 for loss of use. (C 1133.) Defendant Volvo filed a Notice of Appeal on September 6, 2005 (C 1132-35). The. appellate court reversed the trial court's decision on December 8, 2006 and entered judgment *nov* against Spiegel on the basis that the diminished value evidence was admitted without proper foundation. The court never addressed the aggravation and inconvenience award or the loss of use award, and did not explain those amounts would not defeat jnov; nor did the court explain why it granted judgment *nov* as a result of an evidentiary error, as opposed to simply granting a new trial, which is typically the remedy for improperly admitted evidence.

POINTS RELIED UPON FOR REVERSAL

1. The Appellate Court reversed the trial court and entered judgment against Plaintiff, depriving him of

his constitutionally protected interest in a jury trial due to the trial court's error in not requiring sufficient foundation for certain damages testimony. But the only legally-available remedy for such an error is a new trial, which Defendant never requested. Moreover, the Appellate Court's holding in this regard was directly contrary to this Court's decision in *Razor v. Hyundai Motor of America.*[1]

But the car had a serious defect – it would periodically fail to accelerate, sputter, and "starve for fuel" even when the tank still held as much as two to four gallons of gas and the digital readout indicated there were as many as 50 miles to drive until empty. (C 932.) After ten trips to authorized Volvo dealers for repair attempts over a three year period, Marshall Spiegel had enough. Volvo could not fix the defective gas tank on his vehicle. So Spiegel revoked his acceptance of the vehicle and demanded that Volvo return his money. Volvo refused to repurchase the car and this lawsuit was filed. On June 21, 2004, a jury found for Spiegel and awarded him $10,680.00. (C 1133.)

On appeal of the jury's verdict, Defendant did not argue that the jury was improperly instructed on the applicable law or considered inadmissible evidence. Instead, Defendant merely disagreed with the factual conclusion reached by the jury – namely, that Spiegel's car was defective, contending that the jury should not have credited Plaintiff's expert over its own and should not have rejected its argument that

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[1] -- N.E.2d --, 2006 WL 1765427 (Ill., June 29, 2006).

Spiegel should have filled his gas tank more often. The appellate court never reached the majority of the arguments, finding instead that the trial court erred in entering certain testimony regarding diminished value and entering a judgment nov on this basis.

The standard for judgment *n.o.v.* is exceedingly high. "[A] judgment *n.o.v.* may not be granted merely because a verdict is against the manifest weight of the evidence ... [T]he court has no right to enter a judgment *n.o.v.* if there is ***any*** evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome."[2] Here, the jury's factual determinations in Plaintiff's favor were well supported by the evidence presented.

"Plaintiff's expert, Tom Walters, has been in the automotive repair business since 1983. (C842.) He is an ASE certified master mechanic and has worked extensively on luxury cars like the one purchased by Plaintiff. (C842-845.) Among other things he inspects vehicles for insurance companies "to verify the cause of the failure, the amount of damage, and what the best possibility for repair is." (C845.) He was accepted without objection as an expert in automobile mechanics. (C848.)

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[2] *Maple v. Gustafson*, 151 Ill.2d 445, 454, 603 N.E.2d 508 (1992) (emphasis added).

Walters inspected the vehicle and replicated the fuel starvation defect on a test drive. (C 855- 862.) Without objection, he testified to the following:

- with "2 gallons left in the fuel tank you should not be experiencing drivability issues..." (C849);
- at the time he replicated the fuel starvation defect the fuel gage indicated 2 gallons were left in the tank and the trip meter stated 25 miles to empty. (C 861-862);
- at the time he replicated the fuel starvation defect he confirmed, on refilling, that 'the tank indeed had 2 gallons in it when it hesitated and bucked on acceleration (C 862);
- the fuel starvation defect affected safety because it could cause lack of acceleration and power when ramping into traffic (C 863);
- that a manufacturing defect existed with regard to the "fuel pump and/or pick-up in the tank which caused abnormal cavitation with two gallons remaining in the tank." (C 865-66)
- that "two gallons should have been more than sufficient for normal operation" at the time he replicated the defect and "under normal circumstances that would not be correct. I felt that the vehicle should have still provided normal operation with two gallons of fuel left in the tank." (C865.)

The Volvo C70 has a digital readout that states how many miles the driver can travel before the driver should refuel. (C855.) The car sold to Spiegel starves for fuel without warning even when the readout

indicates there are as many as 50 miles to go until refueling. (C 932.) Sometimes the fuel gauge would indicate four gallons, sometimes two, when the engine would starve for gas and fail. Spiegel could not predict when the engine would fail. According to the owner's manual, when there would be less than 5 miles the display would indicate "—," which would mean the car was "running on fumes" and should be refueled. (C879-90.) This was not what happened when Walters replicated the fuel starvation defect. When he was in the acceleration lane and the car started to lose power, shake, caviate and starve for gas, the readout indicated that car could-still travel 30 more miles before needing gas. (C840.)

Spiegel started experiencing problems with the vehicle a few weeks after the purchase, in October 1998. (C 898.) He took it to a Volvo-authorized dealer, complaining of the sputter and dimming idle that later became the subject of this lawsuit. (C 898-899.) The Volvo-authorized dealer told him it could fix the problem my replacing some software so it could "better mix the fuel, air or the engine mix or something like that." (C 899; PX 3 – Repair order 10/9/98.). This did not fix the problem.

Plaintiff went back to a Volvo-authorized dealer in March of 1999, complaining that when the gas tank got below three or four gallons it would "start sputtering and dying." (C 901-902.) Again, no solution. He returned, for a third attempt, to a Volvo-authorized dealer on January 26, 2000. (C909; PX 7 – Repair Order 1/26/00.) This time, he went to a different Volvo-authorized dealer to see if perhaps they could fix it. (C 909.) The car was out of service for 2 days

while the dealer unsuccessfully attempted to fix the defect. (C 910-911.)

When he took his fourth trip to a Volvo-authorized dealer, on February 8, 2000, he specifically showed the dealer that the readout indicated 45 miles until empty, yet the car would sputter and die. (C 912; PX 8 – Repair Order 2/8/00.) He also reported that the car sputtered when the fuel gauge indicated that there were four gallons of gas in the tank. (C 914.) Again, Volvo could not fix the defect. (C 913.)

When Spiegel went back to a Volvo Authorized Dealer on November 17, 2000, the car was out of service four days. (C915-916; PX 9 – Repair Order 11/17/00.) Nevertheless, the defect persisted. He again went back to a Volvo-authorized dealer again on December 6, 2000. (C 917; PX 10 – Repair Order 12/6/00.) The car was still malfunctioning after 6 visits to Volvo Authorized Dealers: it was still hesitating, bucking, dying out on the expressway and losing power on acceleration. (C 918.) During this repair attempt he lost use of the vehicle for 15 days, from December 6, 2000 through December 12, 2000. (C 918.)

At this point, Spiegel started dealing directly with Bob D'Auguste, a Volvo service manager, to attempt to address the problem. (C 921-922) He went back on January 9, 2001 to address the problem and deal with the service manager. (C 920-922; PX 11 – Repair Order 1/9/01.) The service manager could not arrange to fix the defect and Spiegel returned on May 7, 2001. (C 923; PX 12 – Repair Order 5/7/01.) This time; the car was in the shop for over .a month – all the while

Spiegel was deprived of the opportunity to enjoy his convertible in spring. (C 924.)

Spiegel took the car back again on July 24, 2001. (C 925.) This time he requested that a field technician from Volvo try to fix the defect. (C 925.) On this occasion, the car was out of service for a week. (C 926; PX 13 – Repair Order 7/24/01.) John Connell, a Volvo field technician tried to resolve the problem but failed. (C 930.) Marshall Spiegel went back to a Volvo-authorized dealer for the tenth time in August 2001. (C 931; PX 14 – Repair Order 8/14/01.) Again no solution. By this time, Spiegel had lost use of the car for 70 days. (C 934.) The jury awarded $680 for loss of use and $2700 for aggravation and inconvenience.

Defendant argued on appeal that the trial court should not have denied its motion for judgment *n.o.v* because "plaintiff offered only his own testimony in support of his damages" and his testimony should not have been admitted. (Def's Brf. at 13.) But Defendant only made one objection during Plaintiffs damages testimony that was properly overruled as this Court recently held in *Razor v. Hyundai Motor America*.[3] Plaintiff testified, without objection, that he "paid over $50,000 for a Volvo that had [he known he] would have had these problems, [he] would not have purchased." (C-893.) He testified that he would not have bought the car because it was not safe. (C 893.) Spiegel testified, "I bought a car that I thought would be safe, reliable and dependable and found it to be quite the opposite." (C 887.) Even though he made

[3] -- N.E.2d --, 2006 WL 1765427 (III, June 29, 2006).

ten visits to authorized Volvo dealers for repairs (see section 1-B, above), the car continues to fail to accelerate, the engine sputters and, at times, the car completely fails. On one occasion, the engine failed and Marshall Spiegel and his son were stranded on the highway. (C 940-942.)

Plaintiff also testified, without objection, that: based on his normal use he would drive a car approximately 20,000 miles per year, but this one he only used, on average 12,000 miles per year (C 946-947); he did not take as many out-of-town trips as he normally would have because of the defect with the fuel system (C 947); his son gets stressed out and feels unsafe in the car (C 951); and that his wife, when he was married, refused to drive it and was "terrified of it" because of the acceleration problems. (C 951.) Spiegel further testified without objection, that he had knowledge and experience with the sale and rental of luxury cars and that a car such as his would rent for approximately $100 per day. (C 938-939.)

The only time Defendant objected was when Plaintiff was asked how much he would have paid for the car if he had known of the defect. Defendant objected and the trial court properly overruled the objection. As this Court noted in *Razor*, during plaintiff's case in chief, the circuit court precluded plaintiffs counsel from asking plaintiff how much she would have paid for the car if she had known of the defects. This was error.[4] Thankfully, the circuit court in this case did not make the same error and properly admitted Plaintiff's testimony that if he had only paid $25,000

[4] -- N.E.2d --, 2006 WL 1765427 (Ill., June 29, 2006) at * 17.

for the vehicle he would not have brought the litigation. (C 934.) The jury awarded $7300 for diminished value.

The appellate court ruled that the foundation regarding Spiegel's testimony of diminished value was not sufficient and on this basis reversed the jury's verdict and entered judgment against Spiegel. The appellate court never addressed Spiegel's argument that an evidentiary error would, at most, justify a new trial, not judgment *nov.* Moreover, the. appellate court never addressed Spiegel's argument that even if the diminished value testimony is discarded that award of $2700 for aggravation and inconvenience and $680 for loss of use is "some evidence" of damages and should have been deemed sufficient to survive judgment *nov.* The appellate court refused to grant oral argument, took away a jury verdict with an unpublished opinion and denied rehearing without explanation.

REASONS FOR GRANTING THE WRIT

1. **The Appellate Court reversed the trial court and entered judgment against Plaintiff, depriving him of his constitutionally protected interest in a jury trial due to the trial court's error in not requiring sufficient foundation for certain damages testimony. But the only legally-available remedy for such an error is a new trial, which Defendant never requested. Moreover, the Appellate court's holding in this regard was directly contrary to this Court's decision in *Razor.***

Defendant argued to the appellate court that "over objection" Spiegel was "allowed to testify" regarding the diminished value of his car and that the trial court should have "excluded" the testimony because it "lacked a foundational basis." (Def's Brf. at 13.) In this regard, Defendant cited to *Kim*, block-quoting a section of the opinion that begins "to establish an appropriate foundation ... [plaintiff must show three things]." (*Id.*) In other words, Defendant appealed on the ground that the trial court made an evidentiary error and admitted evidence without an adequate foundation. The appellate court disregarded this Court's holding in *Razor* and improperly granted a *jnov* (rather than a new trial) as a result of an abuse of discretion in admitting evidence. This is a dramatic departure from a long line of established law regarding the proper remedy for improperly admitted evidence. It requires this Court's supervisory review.

In its order dated December 8, 2006, the appellate Court held that the trial court admitted loss-of-value evidence on an improper foundation, stating: "Spiegel failed the second and third factors of the *Kim* test" because he "did not state .any basis" for his evidentiary conclusion regarding the vehicle's value. (Order, p. 8.) The trial judge, after hearing argument at sidebar, concluded differently. Having listened to the entirety of Spiegel's testimony, the trial judge concluded Plaintiff had, in fact, stated a basis for his valuation testimony and thus he overruled Defendant's foundation objection. (C934.) Without expressly applying an abuse-of-discretion standard, the appellate Court concluded the trial court erred in

making this evidentiary determination.[5] It is not the evidentiary issue that demands review from this Court, however – it is the fact that the appellate court entered judgment against Plaintiff as a result of this evidentiary error, rather than remanding for anew trial, which is the only legally-permissible remedy.

The proper remedy for a trial court's evidentiary error is not to discard the entire verdict and enter judgment in favor of the Defendant. When a litigant believes evidence has been improperly admitted against it, the law allows for the aggrieved party to move for a new trial.[6] Defendant did not avail itself of the opportunity to seek a new trial as a result of the claimed evidentiary error. Instead, Defendant chose to solely move for judgment notwithstanding the verdict on a variety of legal grounds, such as the privity requirement and its disclaimer of liability for consequential damages.

While Defendant has attempted to avoid the consequences of failing to move for a new trial by trying to characterize the trial judge's error in admitting evidence as plaintiff's failure to make a *prima facie* case, the law does not allow Defendant to do so. As Plaintiff argued in his appellate brief:

> It is important to stress that Defendant never moved for a new trial and therefore waived its

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[5] The Court stated that the standard of review on a *jnov* is, of course, *de novo*. But the evidentiary question still remains an abuse of discretion standard. The fact that Defendant called what should have been a new trial motion a *jnov* does not mean they should get to change the standard of review.

[6] *Bryant v. Livigni*, 250 Ill. App. 3d 303, 310 (5th Dist. 1993).

> arguments about evidentiary error in connection with the determination of damages. As the appellate court explained in *Bryant v. Livigni,* "This objection has been waived. National has not requested a new trial. It has requested judgment *nov,* an outright reversal. In such a case, error in the admission or rejection of evidence is not preserved for review."[7] Here, Defendant did not move for a new trial because Spiegel's testimony regarding damages was improper or because damages were improperly awarded. Judgment *nov* was the not the proper mechanism to. make such challenges and Defendant has not sought a new trial on these points

While Plaintiff does not agree with the appellate court's decision regarding the sufficiency of the foundation laid at trial, Plaintiff wants to stress that the purpose of this petition is not to quibble about the sufficiency (or insufficiency) of Spiegel's foundation. Even if Plaintiff were to agree that the foundation was inadequate, the only legally permissible remedy is a new trial, not *jnov.* The appellate court should not have granted a new trial because Defendant never asked for one. This case demands intervention by this Court because it demonstrates an outcome determinative result due to perceived judicial hostility in the appellate court to warranty cases.

The appellate court's decision was directly contrary to this Court's opinion in *Razor.* In *Razor,* this Court stated, "Accordingly, **although plaintiff's case**

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[7] 250 App. 3d 303, 310 (5th Dist. 1993) (emphasis added).

failed for proof of damages, it would be entirely unjust to reverse the verdict outright. As previously noted, "[w]here the right of recovery exists the defendant cannot escape liability because the damages are difficult to prove."[8] Although Plaintiff brought this language the appellate court's opinion, both in his original brief and on rehearing, the appellate court simply disregarded *Razor*, without explanation.

It has been longstanding jurisprudence in Illinois and nationwide that litigants should be given an opportunity to remedy a defective foundation.[9] Had Defen

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[8] *Razor*, 222 Ill. 2d 75, 108 (2006) (emphasis added).

[9] *See e.g., Rios v. City of Chicago*, 331 Ill.App.3d 763 (2002) ("the trial court erred in **admitting evidence without a proper foundation**, ...we find these errors to be sufficiently prejudicial to warrant reversal and remand for a **new trial**."); *Bafia v. City Intern. Trucks, Inc.*, 258 Ill.App.3d 4 (1994) ("a foundational objection was made irrelevant. Plaintiff would not have been given an **opportunity to** confront the objection or to **remedy any alleged lack of foundation**"); *Ashford v. Culver City Unified School Dist.*, 29 Cal.Rptr.3d 728 (2005) (holding "**the proper remedy**" is to remand to provide an "**opportunity to present authentication**" because "if a proper foundation had been laid, the weight of the evidence would have supported the findings..."); *State v. Biddle*, 652 N.W.2d 191 (Iowa 2002.) (a party objecting to the offer of evidence for this reason [no proper foundation laid] must point out in what particular or particulars the **foundation is deficient** so the adversary may have an **opportunity to remedy the alleged defect**); *May v. Spgncunaok*,695 N.W.2d 196 (2005) ("May effectively deprived the Department of the **opportunity to remedy any alleged defect in foundation** for exhibit"); *Brooks v. SSM Health Care*, 73 S.W.3d 686 (2002) (alleged error is waived if the motion is made too late to give opposing counsel an **opportunity to fix any deficiencies** in the question **or lay an appropriate**

(continued...)

dant's objection been sustained at trial — as this Court's order indicates it should have been — Plaintiff would have been given the opportunity to lay a better foundation and show the basis of his knowledge in further detail. Spiegel should not suffer a penalty because an objection was sustained on appeal, rather than by the trial judge.

Indeed, on the topic of rental value the trial judge initially sustained a foundation objection, but then overruled it after Plaintiff laid an addition three pages of foundation. This brings Plaintiff to his second argument regarding leave to appeal, which is that even if the value evidence is totally excluded and disregarded Plaintiff still made a prima facie case because he introduced evidence of — and the jury awarded damages for loss Of use of the Vehicle as well as aggravation and inconvenience.

2. Even if Spiegel's testimony regarding diminished value is discarded, Plaintiff still made a *prima facie* case because he introduced evidence of damages of loss of use and aggravation of inconvenience — for which the jury awarded $380 and $2700, respectively — accordingly, there was some evidence of damages and *jnov* improper.

As this Court is well aware, *jnov* is improper if there is any evidence on each element of the claim. The 12/8/06 Order by the appellate court ignores the fact

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(...continued)
foundation for the witnesses' opinion.")

that even if the $25,000 diminished value figure is discarded, Spiegel still introduced evidence and was properly awarded by the jury damages for loss of use and aggravation and inconvenience. Spiegel laid a detailed foundation regarding his experience regarding the rental of similar cars (C938-2939) and was awarded $380 in loss of use by the jury.

The loss of use evidence alone is some evidence of damages and sufficient to defeat *jnov*, but Plaintiff also introduced and was awarded $2,700 in damages for aggravation and inconvenience.[10] This Court in *Razor* specifically affirmed the award of aggravation and inconvenience damages (even as it discarded and remanded for a new trial on diminished value damages). So again, the appellate court's order is in direct disregard of *Razor*. The December 8, 2006 Order is completely silent on the issue of aggravation and inconvenience or loss of use damages.

3. Review is required to enforce Supreme Court Rule 352.

Supreme Court Rule 352 cautions that cases should be taken without oral argument "sparingly" and only when the issues are not substantial. Plaintiff believes that the issues presented in this case are "substantial"

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[10] Given the 10 repair attempts and the time that Spiegel and his son were stranded on the highway (C 940-942.), $2,700 is not and unreasonable amount to award, for instance this works out to $200 per repair attempt and $700 for the highway incident. In any event, the quantum of damages is not being challenged by the Defendant (who never sought remititur and is not a proper inquiry on a jnov.

and that oral argument was appropriate and constitutionally required. The appellate Court's order has deprived Plaintiff of a jury verdict and his counsel has been deprived of compensation for hundreds of hours of work. Taking a case without oral argument and reversing is qualitatively different than taking a case without oral argument and affirming, especially when the reversal entails taking away a jury verdict in which there exists a constitutionally-protected property interest. Plaintiff believes that in a case such as this oral argument is constitutionally required as a matter of due process.

In its 12/8/06 Order the appellate Court did not make any findings regarding whether the appeal presents "substantial issues." If the appeal presents a substantial issue, then Rule 352 does not allow disposition without oral argument. The issue presented in *Kim* and *Razor* regarding lay testimony of diminished value is substantial and complex, and there still exists confusion in the trial courts as to what foundation is required. Given the appellate Court's ruling regarding foundation requirements it seems that no case can be proven without an expert opinion on diminished value. This would impose a prohibitive cost burden on a consumer's ability to seek redress for warranty violations, a result exactly opposite the stated goals of warranty and consumer protection law.

Plaintiff respectfully submits that this case presents substantial issues regarding redress for violations of consumer protection law and thus oral argument was required. In any event, Supreme Court Rule 352 says even when cases present no substantial issues they

should be disposed of without oral argument only "sparingly."

Unpublished opinions are becoming an increasing problem in the appellate court. They result in sloppy and unaccountable decisions like in this case — where a *jnov* is granted as a result of an evidentiary error, which is totally improper and unprecedented in Illinois law. The appellate court is abusing Rule 352 and this Court must intervene.

Part of the confusion in this case stems from a tactical decision made by Defendant. Defendant never moved for a new trial, which is what is should have done if it believed the trial court's evidentiary rulings were wrong. If Defendant had done so, the issues would have been more clearly presented and the appellate Court would most likely have remanded for a new trial. But the complexity (and the confusion) arises because Defendant never asked for a new trial. Defendant made the strategic choice to only go for a *jnov*. Indeed, Defendant spent most if its appellate brief arguing the legal issues that would presumably justify a *jnov*. The "damages issue" presented by the its supervisory authority over the Appellate Court regarding this rule.

Respectfully Submitted,

MARSHALL SPIEGEL, Plaintiff-Appellee

By One Of His Attorneys

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix is 15 pages.

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Opinion of First District Court of Appeals . . A2-A10

Order of January 10, 2007, denying Appellant's petition for rehearing A11

SIXTH DIVISION

December 8, 2006

No. 1-05-2789

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

MARSHALL SPIEGEL,	) Appeal from the
	) Circuit Court of
Plaintiff-Appellee,	) Cook County,
	)
v.	) No. 01 M1 149629
	)
VOLVO CARS NORTH	)
AMERICA, L.L.C.,	) Hon.Francis J. Dolan
Defendant-Appellant.	) Presiding Judge

ORDER

Defendant, Volvo Cars North America, L.L.C., appeals from a jury verdict in favor of plaintiff, Marshall Spiegel, in this breach of implied warranty of merchantability claim brought under the Magnuson-Moss Warranty Act (Act), 15 U.S.C. § 2301, *et seq*. Volvo contends that the trial court erred by denying its motion for judgment *n.o.v.* We reverse.

On September 24, 1998, Spiegel bought a 1998 Volvo C70 convertible from Towne and Countree Auto Sales, Inc., in Schererville, Indiana, a non-party. Spiegel received a limited warranty from Volvo. At the time

of trial Spiegel continued to own and operate the car and had driven it about 70,000 miles.

On October 9, 2001, Spiegel filed a three-count complaint against Volvo under the Magnuson-Moss Warranty Act (Act), 15 U.S.C. §2301, *et seq.*, alleging: (1) breach of limited warranty; (2) breach of implied warranty of merchantability; and (3) revocation of acceptance. The case proceeded to jury trial on June 17, 2004, on counts one and two. Spiegel testified that he bought the Volvo because lilt's known for being the safest car in the world *** that's what Volvo says and that's what their ads say, for life." Spiegel considered the car an investment testifying:

> "[The Volvo name was supposed to be reliable and dependable and something, you know – you know, you could drive it, that they would stand behind their product and, you know, I would continue to enjoy it and drive it the usual hundred thousand miles I do when I go through most cars. Each car I've owned for many years have been – I rolled it over a hundred thousand miles. So I buy and own to grow old, like a stock or a piece of real estate."

But the car would periodically fail to accelerate, sputter and "starve for fuel" even when the tank still had as much as two to four gallons of gas and the digital readout indicated there were as many as 50 miles to drive until empty. Spiegel tried to keep the tank full but it was not always possible. Spiegel testified that he did not feel safe driving his car stating:

> "It's not safe. It's dangerous. It's very unsettling to be on a highway, just like you heard yesterday,

> trying to accelerate a car and the car doesn't have any acceleration. You know, if you're on the highway and you need to get around somebody or avoid a situation or whatever you might need acceleration, it's terrifying not to be able to have that with you." Spiegel testified that the car sputtered, hesitated, and lacked acceleration, "when [he] didn't have time to whatever to keep the gas up," and that "if the car ran down to the last few gallons of gas, the car would either sputter, stop, or die," and that, "the car was stopping intermittently, sputtering, the same problem that I have been having all along. You know, if the gas - gas got below a certain level, the last few gallons or whatever, it would act like it's out of gas."

Spiegel testified that he and his son were once stranded on the highway when the car died in the express lanes. They waited for an hour for help as cars sped by them. He was afraid that he and his son would be struck by another vehicle as they sat waiting in the car. Another time he had to walk to a gas station and push the car.

Spiegel testified that he brought the car in to be serviced at various Volvo certified service centers 10 times since he purchased the car but none of the service centers could fix the problem. He started experiencing problems a few weeks after purchasing the car. He took the car in to authorized Volvo service centers in October 1998, March 1999, January 2000, February 2000, November 2000, December 2000, January 2001, May 2001, July 2001, and August 2001. The car was in service for a total of 70 days. Once, when Spiegel took the car in for service, he was told to keep the tank full.

Spiegel testified that he paid over $50,000 for the car (the bill of sale states the car was purchased for $46,560) but had he known of the car's problem he never would have purchased it because it was not safe. He usually droves a car about 20,000 miles a year but he only drove the Volvo about 12,000 miles a year because of the problem with the fuel system. Spiegel did not take as many trips out of town as usual with the Volvo, his son gets "stressed out and feels unsafe in the car and his former wife refused to drive in the car and was "terrified of it" because of the acceleration problems. Over defendant's objection Spiegel answered his counsel's question, "What do you think the car is worth?" Plaintiff replied, "I probably would not have brought the litigation, if I paid maybe $25,000:"

Spiegel presented the testimony of expert Tom Walters, an ASE certified master mechanic who had worked on luxury car like Spiegel's. Walters testified that he inspects vehicles for insurance companies "to verify the cause of the failure, the amount of damage and the best possibility for repair." Walters inspected Spiegel's car and replicated the alleged fuel starvation defect on a test drive. Walter stated that it was cold that day so he did not think vapor expansion was an issue. Walters testified that he drove the vehicle "at which time the vehicle engine began to stave for fuel or hesitate severely. I was at that point surprised because upon the miles to empty still indicate it had 25 miles to empty. The fuel gauge still registered in the two range or two gallons left in the tank range." "I felt that 2 gallons left in the fuel tank you should not be experiencing driveability issues at that point,

that the fuel should be less than that in the tank before you might experience some type of hesitation or engine actually quitting." Walters opined that the fuel starvation problem affected safety because it could cause a lack of acceleration and power when ramping into traffic. Walters also opined that there was a defect with regard to the "fuel pump and/or pick-up in the tank which caused abnormal cavitation with two gallons remaining in the tank." Walters concluded testifying that "two gallons should have been more than sufficient for normal operation," that the time he replicated the defect and "under normal circumstances that would not be correct. I felt that the vehicle should have still provided normal operation with two gallons of fuel left in the tank." Walters also stated that Spiegel could have avoided the problem by always refilling his gas tank.

Volvo presented evidence that its limited warranty provided in part, that it did not cover "[t]he loss of vehicle use, loss of time, telephone calls, towing, lodging, car rental, food, and other incidental and consequential damages." Spiegel acknowledged that the car's owner's manual stated:

> "The fuel tank is designed to hold approximately 18.5 U.S. gallons *** with sufficient volume left over to accommodate possible expansion of the fuel in hot weather. Be aware that the usable tank capacity is somewhat less than the specified maximum. When the fuel level is low, such factors as ambient temperature, the fuel's 'vapor pressure' characteristics, and terrain can affect the fuel pumps' [sic] ability to supply the engine with an adequate supply of fuel. Therefore, it is advisable

> to refuel as soon as possible when the needle nears the red zone, or when the fuel warning light comes on."

Volvos' expert, Christopher J. Densley, a Volvo product follow-up engineer, testified that fuel starvation may occur when a car is run very low on fuel and may result in engine misfires, loss of performance, or a stall. Densley reviewed and analyzed the repair orders for the car, and inspected, tested and evaluated the car, in particular, its fuel tank. The car had a maximum capacity of 18.5 gallons with a usable capacity of 16.65 gallons allowing for fuel vapor expansion.

Densley testified that Spiegel and he tried to recreate the problems during a test drive. But, the problems occurred only when the gauge read empty and the trip miles indicator read zero. Densely explained:

> "As [Spiegel] demonstrated to me on the test drive *** he's getting the sputtering *** and starving under acceleration, And this goes back to what we described a few moments go where you have a fairly large tank with a very flat bottom. Under acceleration, the fuel will slosh to the back of the tank. If you have a long acceleration and that fuel remains stuck against the back of the tank the fuel pickup which is located centrally in the tank can't get at that fuel and has trouble supplying fuel to the engine." *** You'll get misfires, you'll get loss of performance and obviously, ultimately its possible to get a stall."

Densley opined that the car's fuel tank was "not defective in any way, shape, or form," and that engine

fuel starvation occurred because of the car being run on very low fuel.

Volvo moved for a directed verdict. The trial court denied Volvo's motion and submitted both counts to the jury. The jury found in favor of Spiegel on the implied warranty of merchantability claim and in favor of Volvo on the breach of limited warranty claim and awarded Spiegel $10,680; $7,300 for diminished value, $680 for loss of use, and $2,700 for aggravation and inconvenience. The trial court denied Volvo's motion for judgment *n.o.v.* and found in favor of Volvo on Spiegel's revocation of acceptance claim. The trial court then awarded attorney fees and costs to Spiegel in the amount of $31,479.30. This timely appeal followed.

On appeal, Volvo contends that the trial court erred by denying its motion for judgment *n. o. v.* because Spiegel failed to establish a *prima facie* case of breach of implied warranty of merchantability.

A judgment *n.o.v.* may be granted only when all of the evidence, when viewed in a light most favorable to the plaintiff, so overwhelmingly favors the defendant that no contrary verdict based on that evidence could ever stand. Pedrick v Peoria & Eastern R.R. Co., 37 Ill. 2d 494, 510 (1967). A motion for judgment *n.o.v.* presents a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it, there is a lack of evidence to prove any necessary element of the plaintiff's case. York v. Rush Presbyterian-St. Luke's Medical Center, 222 III. 2d 147, 178 (2006). If reasonable minds might differ as to inferences or conclusions to be drawn from

the facts presented, judgment *n.o.v.* must not be entered. York, 222 Ill. 2d at, 178. A reviewing court cannot usurp the function of the jury by substituting its judgment on questions of fact which are reasonably supported by both parties. York, 222 Ill. 2d at, 178. We review *de novo* the circuit court's decision denying defendant's motion for judgment *n.o.v.* York, 222 Ill. 2d at, 178.

In order to prove breach of implied warranty of merchantability, the plaintiff must show: (1) a defect; (2) existing at the time the car left the manufacturer's control; (3) rendering it unfit for the ordinary purposes for which a car is used; and, (4) damages. 810 ILCS 5/2-314 (West 1998); Tweedy v. Wright Ford Sales, Inc., 64 111. 2d 570, 574 (1976) (elements one - three); Kim v. Mercedes-Benz, U.S.A., Inc., 353 III. App. 3d 444, 460 (2004) (element four).

Volvo argues, inter alia, that Spiegel failed to prove damages. Damages are an essential element of the *prima facie* case for breach of warranty. Kim, 353 Ill. App. 3d at 460. "Without damages there can be no recovery." Valenti v. Mitsubishi Motor Sales of America, Inc., 332 Ill. App. 3d 969, 973 (2002). The plaintiff does not have to calculate damages for breach of warranty with mathematical precision but basic contract theory requires that damages be proved with reasonable certainty, precluding damages based on mere conjecture or speculation. Razor v. Hyundai Motor America, 222 Ill. 2d 75, 106-07 (2006). The measure of damages for a breach of warranty claim is the difference between the value of the property as warranted and the actual value on the date of the breach. Razor, 222 Ill. 2d at 106-07. The plaintiff

bears the burden of establishing the correct measure of damages. Valenti, 332 Ill. App. 3d at 973. A lay witness may give testimony regarding the diminished value of personal property. Kim, 353 III. App. 3d at 455.

> "To establish an appropriate foundation as to the value of personal property, the lay witness, at a minimum, should be able to testify as to the following factors: (1) familiarity with the property in question; (2) actual knowledge of the value of the subject property; and (3) the basis of the knowledge of that value, i.e., how, when and where the witness obtained the knowledge." Kim, 353 III. App. 3d at 456-57.

In this case, Spiegel failed to establish the second and third factors of the Kim test. Spiegel testified only that if he had paid $25,000 for the car he would not have brought the law suit. He did not state any basis for this figure. While he did state that he drove the car only 12,000 miles instead of the usual 20,000 miles and took fewer trips than he would like, these are speculative bases for determining the value of the defective car upon purchase. There was no evidence that the car could not have gone on these trips or could not have been driven 20,000 miles a year with the defect. In fact, plaintiff testified that he had driven the car about 70,000 miles at the time of trial. Thus, Spiegel failed to prove the value of the defective car, even when viewed in a light most favorable to Spiegel, and thereby failed to prove a prima facie claim of breach of implied warranty of merchantability. Accordingly, the trial court erred by denying Volvo's motion for judgment *n.o.v.* on the breach of

implied warranty of merchantability claim. Spiegel attempts to distinguish Kim by noting that the plaintiff failed to comply with Supreme Court Rule 213 regarding disclosure of a witness. 177 Ill. 2d R, 213. Yet, Spiegel ignores 'the fact that the Kim court discussed the foundation issue regardless of its discussion of the Rule 213 issue. Kim, 353 III. App. 3d at 455. Thus, the Kim factors apply here.

Spiegel also contends that his expert Tom Walters offered testimony regarding diminished value but cites to nothing in the record. Therefore, this argument is waived. 188 Ill. 2d R. 341(e)(7).

Because we have reversed on the basis that Spiegel failed to prove damages and thus failed to prove a prima facie claim of breach of implied warranty of merchantability we need not address the other issues raised by Volvo on appeal.

Reversed.

FITZGERALD SMITH, P.J., with McNULTY and O'MALLEY, J.J. concurring.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
SIXTH DIVISION

MARSHALL SPIEGEL,	)	
	)	
Respondent-Appellee,	)	
	)	
v.	)	No. 1-05-2789
	)	
VOLVO CARS NORTH AMERICA, LLC,	)	
	)	
	)	
Petitioner-Appellant.	)	

ORDER

IT IS HEREBY ORDERED that Petitioner-Appellant's Petition For Rehearing is Denied.

_____

Presiding Justice James Fitzgerald Smith

_____

Justice Jill K. McNulty

_____

Justice Denise O'Malley

FILED
DEC 10 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 07-573

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL, PETITIONER

v.

VOLVO CARS NORTH AMERICA, L.L.C.

PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF ILLINOIS

REPLY BRIEF

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Volvo's opposition to the Petition requires only brief comment.

First, Volvo argues that Spiegel did not raise the constitutional question in the appellate court. Of course, this would have been impossible as he is challenging an appellate deprivation of process in the first instance. All the cases cited by Volvo involve situations where the petitioner clearly knew or should have known of his claims in the trial court, or earlier – they all involve non-court actors. Here, it is the Illinois appellate court itself – and specifically the Illinois Supreme Court that deprived Plaintiff of his property right without due process in the form of a hearing. Plaintiff requested a hearing and was denied one. In his request Plaintiff noted a hearing was required as a matter of constitutional law, specifically the due process clause. (App. 10) Plaintiff also noted that a jury verdict is, in fact, a property right. (Id.) There was nothing vague about Plaintiff's request and the pending petition is nothing more than a proper enlargement of the arguments advanced below.

Given judicial immunity issues, it would be manifestly unfair to deprive Plaintiff of review. This Court is the only protection that Plaintiff has against appellate level deprivations of due process in the first instance. The Illinois Supreme Court has, in practice, become far too brazen with its one-sentence denials of review without explanation. Volvo does not deny that unpublished dispositions are essentially written by law students, a fact that is well-known to most Illinois practitioners with meaningful appellate experience. At a minimum this Court should exercise its supervisory

power and remand for a hearing on these issues so that a fuller record can be developed. Something is seriously amiss in the Illinois Appellate Court – where some of the judges, quite frankly, don't seem to be doing their jobs. This assertion is admittedly bold, and yes, somewhat provocative; but it based on knowledge undersigned counsel has gained from years of experience as an Illinois practitioner. At some point there has to be some accountability at the state appellate level and Spiegel would welcome the opportunity to develop an evidentiary record on this point.

Because judges likely cannot be sued directly for negligence in disregarding their judicial duties, only an order from this Court can set things right. Admittedly, this case is in an unusual procedural posture – and, as a result, Petitioner has been limited in the degree and manner in which he has been able to advance his constitutional claims. But that does not mean they haven't been pressed. Indeed, given the manner in which the case was decided in the appellate courts there was no way to feasibly advance them earlier. The Illinois appellate court should not be able to avoid constitutional review by using unpublished dispositions in a manner to hide what is essentially activist judging by a judicial panel that is politically-appointed and hostile to consumer protection claims.

The remainder of Defendant's argument is simply question-begging. Whether a jury's verdict is entitled to due process protection in the appeal process is the question on which review is sought, not a basis to deny review. Volvo's analysis of the issue merely

underscores why it is an important issue that merits this Court's attention.

Plainitiff, Marshall Spiegel, respectfully requests that this Court grant the Petition; or, in the alternative, remand for a hearing (possibly evidentiary) on the issues concerning appellate deprivations of process in the Illinois courts. How else can Plaintiff attempt to prove what many Illinois practitioners know – unpublished opinions are written by law students; this opinion's poor quality is evidence of the fact and the Court avoids accountability for these actions by simply refusing to explain itself or even let a litigant orally address a judge.

Respectfully Submitted,
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